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7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10
11 SARAH GAGAN, an individual,
12 CLAIRE GAGAN, an individual, and
HALO'S HEART, LLC, a California
Limited Liability Company

13 Plaintiffs,

14 vs.

15 MARC ANTOINE GAGNON, an
16 individual, MEGGIE ROY, an individual,
MARIEVE SIMARD, an individual,
17 ALAIN POIRIER, an individual, and
DOES 1-280, inclusive,

18 Defendants.
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Case No. 5:22-cv-00680-JWH-SP
Assigned to Hon. John W. Holcomb

**PLAINTIFFS' MEMORANDUM
OF POINTS AND AUTHORITIES
IN OPPOSITION TO
DEFENDANTS' MARC ANTOINE
GAGNON AND MEGGIE ROY'S
MOTION TO DISMISS UNDER
RULE 9(b)**

Hearing (Motion to Dismiss):

Date: July 8, 2022

Time: 9:00 a.m.

Ctrm: 9D, Ronald Reagan Federal
Building and U.S. Courthouse

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1 Plaintiffs SARAH GAGAN (“Sarah”), CLAIRE GAGAN (“Claire”), and
 2 HALO’S HEART, LLC, (“Halo’s”), (Sarah, Claire and Halo’s shall sometimes
 3 hereafter be collectively referred to as “Plaintiffs”) by and through its undersigned
 4 counsel, respectfully submit this Opposition to the Motion to Dismiss For Failure to
 5 Comply with Rule 9(b), filed by Defendants’ MARC ANTOINE GAGNON
 6 (“Marc”) and MEGGIE ROY (“Meggie”), (Marc and Meggie shall sometimes
 7 hereafter be collectively referred to as “Defendants”).

8 **I. INTRODUCTION**

9 Defendants’ Motion to Dismiss relies on two arguments: (1) that every single
 10 claim, even non-fraud claims, are subject to the heightened pleading standard of Rule
 11 9(b); and (2) that the allegations of the fraudulent acts are not specifically pled to
 12 give Defendants adequate notice of their alleged misconduct to defend against it.
 13 Neither argument is tenable.¹

14 First, only ten of Plaintiffs’ fifteen claims require allegations of fraud as a
 15 necessary element.² The remaining five claims—including clearly non-fraud based
 16 claims like ejectment and trespass—require no showing of fraudulent conduct and
 17 stand independently on allegations of non-fraudulent conduct.³ Defendants
 18 nonetheless seek to expand the application of Rule 9(b)’s heightened pleading
 19 standard to encompass *all* claims, thereby ignoring Rule 8 in an attempt to eviscerate
 20 the well-established “plausibility” pleading standard of Federal Courts.

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 23 ¹ Critically, Defendants moved to dismiss the Complaint for failure to plead with
 24 particularity under Rule 9(b), but have made no motion to dismiss under Rule
 12(b)(6).

25 ² Conspiracy to commit fraud; intentional misrepresentation; negligent
 26 misrepresentation; conversion; financial elder abuse; rescission & restitution,
 27 promissory estoppel, accounting, unjust enrichment, and (arguably) declaratory
 28 relief.

³ Ejectment, trespass and three causes of action for breach of contract.

1 Second, and more importantly, Plaintiffs' Complaint is replete with specific
 2 allegations of Defendants' wrongdoing, including the circumstances in which it
 3 occurred. The allegations state the "who, what, when, where, and how" of the
 4 misconduct with the requisite particularity to give Defendants notice of the charges
 5 and defend against them. There is no reasonable basis for either Defendant to claim
 6 otherwise.

7 This Court should summarily dispense with Defendants' arguments and deny
 8 their Motion to Dismiss. Alternatively, if this Court finds any merit in Defendants'
 9 Motion, it should afford Plaintiffs the opportunity to amend.

10 **II. STANDARD OF REVIEW**

11 "Pleadings must be construed so as to do justice." Fed. R. Civ. P. 8(e).
 12 Generally, a pleading need only state "a short and plain statement of the claim
 13 showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). When fraud is
 14 alleged, the pleading must state with particularity the circumstances constituting
 15 fraud, so that the defendant can prepare an adequate answer. Fed. R. Civ. P. 9(b);
 16 *Semegen v. Weidner*, 780 F.2d 727, 734–35 (9th Cir. 1985). Averments of fraud must
 17 be accompanied by "the who, what, when, where, and how" of the misconduct
 18 charged. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).
 19 "Malice, intent, knowledge, and other conditions of a person's mind may be alleged
 20 generally." Fed. R. Civ. P. 9(b). Although fraud must be particularly pled, "it still
 21 must be as short, plain, simple, concise, and direct, as is reasonable under the
 22 circumstances, and as Rules 8(a) and 8(e) require." *Carrigan v. California State*
 23 *Legislature*, 263 F.2d 560, 565 (9th Cir. 1959).

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1 **III. ARGUMENT**

2 **A. Plaintiffs' Have Pled Their Fraud Allegations With the Requisite** 3 **Specificity**

4 Defendants incorrectly argue that all fifteen of Plaintiffs claims—even those
 5 based on contract—are “grounded in fraud” and thus subject to the heightened
 6 pleading requirements of Rule 9(b). While Plaintiffs disagree, as discussed *infra*,
 7 they have nonetheless satisfied the particularity requirement with respect to all
 8 claims.

9 As to the fraud allegations, Defendants assert that “the complaint is devoid of
 10 specific facts as to which defendant made what misrepresentation to which Plaintiff,
 11 and when and how.” (Motion, p. 2:7-10.) “It is axiomatic that a defendant cannot
 12 defend against a claim so vague that it is impossible to decipher, which is the reason
 13 behind Rule 9(b) in the first instance.” (Motion, p. 2:15-17.)

14 These contentions are misguided. For either Defendant to argue the
 15 allegations fail to provide sufficient notice of the wrongful conduct is contrary to
 16 any reasonable reading of the Complaint. For example, Defendants focus on
 17 Paragraph 12 of the Complaint and contend, “it is impossible to tell” what
 18 Defendants are being described and “impossible to tell if Paragraph 12 relates to
 19 conduct by all defendants or only Roy and Gagnon, or some other mixture of the
 20 four.” (Motion, p. 4:4-9, p. 4:11-13.)

21 There is no reasonable basis for this “confusion.” Paragraph 12, the first
 22 introductory paragraph in the “Factual Background” section of the Complaint states,
 23 in its entirety:

24 **Defendants Marc and Meggie**, a married pair of grifters, con artists,
 25 and swindlers, ingratiated themselves with Plaintiffs Sarah and Claire
 26 for the main purpose of obtaining through deceit and undue influence
 27 money and possessions from daughter and mother Plaintiffs, Sarah and
 28 Claire, respectively. After realizing Sarah’s and Claire’s considerable

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 MARC ANTOINE GAGNON AND MEGGIE ROY’S
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1 wealth, Defendants began a calculated campaign to gain Sarah's and
 2 Claire's trust and confidence. Based upon information and belief, upon
 3 achieving a special relationship of trust and confidence with the
 4 Plaintiffs Sarah and Claire, Defendants stole hundreds of thousands of
 5 dollars from Plaintiffs Sarah and Claire via an undue enrichment
 6 conspiracy to commit fraud and embezzlement." (Complaint ¶ 12,
 7 emphasis added.)

8 Clearly, Paragraph 12 is referring to Defendants Marc (Gagnon) and Meggie
 9 (Roy). Defendants also ignore the litany of allegations that follow (Paragraphs 13-
 10 48), which detail the timeline of events and attendant misrepresentations or
 11 concealments by Marc and Meggie that took place from 2016 through 2021. Reciting
 12 all of the specific allegations ignored by Defendants would be akin to restating the
 13 entire Complaint. A sampling of the allegations, below, demonstrates the level of
 14 specificity employed by Plaintiffs.

15 **1. Marc and Meggie's Fraudulent Conduct Related to the Bel**
 16 **Air Home**

17 In 2016, Defendant Marc met Plaintiff Sarah in Berkley, California.
 18 (Complaint ¶ 13.) After learning of Sarah's wealth, Marc introduced her to his wife,
 19 Meggie. (Complaint ¶ 13.) When Sarah returned to her home in Palm Desert,
 20 California, Marc and Meggie moved from Berkeley, California to a small apartment
 21 in Palm Desert, California in order to live near Sarah and her family. (Complaint ¶
 22 14.) Marc and Meggie then befriended Sarah's parents, spending substantial time at
 23 Plaintiffs' residences and their country club. (Complaint ¶ 15.) After moving to Palm
 24 Desert, Marc and Meggie purposefully complained about their small apartment and
 25 inability to purchase a home in Palm Desert. (Complaint ¶ 15.) Marc and Meggie
 26 made these representations with the intent to sway Sarah into purchasing a property
 27 in which Marc and Meggie could live, which she ultimately did through her
 28 company, Halo's. (Complaint ¶ 15.)

1 In 2020, Marc and Meggie falsely represented they would make rental
 2 payments on the property purchased by Halo's and falsely represented they would
 3 pay for an option to purchase the home. Specifically, on February 14, 2020 Marc
 4 and Meggie orally agreed to lease a residential property known as the "Bel Air
 5 Home," from Halo's in exchange for a below-market rental rate of \$1,847.50 per
 6 month. (Complaint ¶¶ 15-17.) Although Marc and Meggie have occupied the Bel
 7 Air Home since February 14, 2020, neither one of them has ever made a single rent
 8 payment to Halo's. (Complaint ¶¶ 19, 98.) On April 1, 2020, Marc and Meggie
 9 entered into an Option Agreement with Halo's, which granted Marc and Meggie an
 10 option to purchase the Bel Air Home at a below market price in exchange for a \$100
 11 "Initial Option Payment." (Complaint ¶¶ 15-17, 108.) However, March and Meggie
 12 never made this payment. (Complaint ¶¶ 21, 108.)

13 **2. Marc and Meggie's Fraudulent Conduct Related to the**
 14 **Vehicles Purchased by Plaintiff**

15 Also in 2020, Marc and Meggie falsely represented they would pay Sarah for
 16 two vehicles she purchased for them. Specifically, "Defendants repeatedly
 17 complained about their old and unreliable vehicle, and their inability to purchase a
 18 new car, for the purpose of swaying **Sarah to purchase a car for Defendant Marc.**"
 19 (Complaint ¶ 24. Emphasis added) "**Marc convinced Sarah** to purchase a Jaguar
 20 for Defendants, for the purchase price of \$51,500. Defendants verbally agreed to
 21 repay Sarah for the cost of the Jaguar." (Complaint ¶ 25.) "**Thereafter, Marc**
 22 **claimed** that the Jaguar was a lemon and returned the Jaguar to the dealership for a
 23 refund of \$50,000" but did not return the money to Sarah despite an agreement to do
 24 so. (Complaint ¶ 26. Emphasis added) "**Marc further convinced Sarah** to purchase
 25 a Mercedes Benz for Defendants for the purchase price of \$70,000. Defendants
 26 verbally agreed to repay Sarah for the cost of the Mercedes Benz. Despite this
 27

1 agreement, to date, Defendants are still in possession of the Mercedes Benz, but have
 2 made no payments to Sarah to reimburse her for the cost of the Mercedes Benz.”
 3 (Complaint ¶ 27. Emphasis added)

4 **3. Marc and Meggie’s Fraudulent Conduct Related to the**
 5 **Montecito Home Redesign**

6 In 2021, Marc and Meggie falsely represented that Meggie was a skilled
 7 interior designer then proceeded to convert assets during a home renovation project
 8 and defraud Plaintiffs with the help of Defendants Alain and Marieve. Specifically,
 9 “**Defendant Meggie claimed** to be a skilled interior decorator” and she and Marc
 10 convinced Plaintiffs to hire Meggie to remodel a house in Montecito, California (the
 11 “Montecito House”) (Complaint ¶¶ 28-29. Emphasis added) “In 2021, **Plaintiff**
 12 **Sarah entered into an oral contract with Meggie** whereby she would design,
 13 remodel, furnish, and decorate Plaintiffs’ home in Montecito, California (“Montecito
 14 Renovation Agreement”). **Meggie agreed** to design the Montecito home to the
 15 standards and preferences of Plaintiff Sarah, which was to be completed on or before
 16 June 1, 2021. In return, **Sarah was to compensate Meggie** in the total amount of
 17 \$300,000. Plaintiff Sarah did not agree that Marc would perform any work under the
 18 Montecito Renovation Agreement.” (Complaint ¶ 30. Emphasis added.)

19 In May 2021, Marc and Meggie moved into the Montecito guesthouse and
 20 purportedly proceeded with the renovation and re-design of the main house and
 21 requested that Sarah issue payment of \$100,000 for a general contractor. (Complaint
 22 ¶ 31.) However, “[d]uring the renovation, **Meggie made or directed multiple**
 23 **mistakes**, which led Plaintiff Sarah to believe that Meggie was not an expert in
 24 renovation or interior design, despite the representations made by Defendants to
 25 Plaintiffs Sarah and Claire.” (Complaint ¶ 32. Emphasis added) “**Meggie failed to**
 26 complete the renovation and redesign of the Montecito House by June 1, 2021.

1 Indeed, **Meggie failed to** complete the renovation and redesign of the Montecito
 2 House in total. The Montecito House was left uninhabitable and unfurnished.”
 3 (Complaint ¶ 37. Emphasis added)

4 Plaintiffs also detail the fraudulent conduct of Marc and Meggie during the
 5 Montecito House renovation. Specifically, “During the renovation, Defendants
 6 removed fixtures from the house, such as expensive chandeliers, and sold them
 7 without the express permission or consent of Plaintiff Sarah, and for their own
 8 personal financial gain. Plaintiff Sarah did not receive the proceeds from the sale of
 9 any fixtures removed from the Montecito house by Defendants.” (Complaint ¶ 33.)
 10 Defendants used Sarah’s credit card to purchase numerous items from vendors,
 11 including Wayfair, Amazon, Burke Décor, and Rove, in an amount exceeding
 12 \$100,000, without the express permission or consent of Plaintiff Sarah; the items
 13 purchased are not in the Montecito House and are unaccounted for to date.
 14 (Complaint ¶ 34.) Marc and Meggie also threw a lavish party using Sarah’s credit
 15 card without her express permission or consent. (Complaint ¶ 36.)

16 Marc and Meggie also conspired with their cousins in the fraudulent scheme.
 17 Specifically, “[d]uring the renovation, Defendants allegedly hired their cousins
 18 Alain and Marieve, to assist with the renovation without the express permission or
 19 consent of Plaintiff Sarah, and demanded that they be paid \$15,000 for their labor.
 20 In addition, Defendants allowed Alain and Marieve to live at the Montecito House
 21 without the express permission or consent of Plaintiff Sarah.” (Complaint ¶ 35.)⁴

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25
 26 ⁴ Paragraph 35 is the first mention of Alain and Marieve, who are referred to simply
 27 by name. Reading the Complaint as a whole and in context makes clear that any
 28 reference to “Defendants” prior to Paragraph 35 includes only Marc and Meggie.

1 **4. Marc's Fraudulent Conduct Related to the Website Design**

2 Defendant Marc also fraudulently obtained and controls intellectual property
3 belonging to Plaintiff Sarah's business. Specifically, "**Marc held himself out** to be
4 an experienced and knowledgeable website designer and convinced Sarah to allow
5 Marc to create [a website for Sarah's business]." (Complaint ¶ 38. Emphasis added.)
6 However, after creating the website, Marc failed to transfer ownership and
7 administrative access to Sarah, despite repeated demands, and continues to maintain
8 control over Sarah's business website, its content, and her intellectual property.
9 (Complaint ¶ 39.)

10 **5. Marc and Meggie's Fraudulent Conduct Related to Duress,**
11 **Undue Influence, and Accessing Plaintiffs' Safes**

12 "On May 8, 2020 Jim Gagan passed away. Plaintiffs Sarah and Claire were
13 devastated when Mr. Gagan passed. Claire and Sarah both felt lonely and were
14 emotionally vulnerable during this difficult time." (Complaint ¶ 22.) "Defendants
15 continued to take advantage of Plaintiffs Sarah and Claire in their grief stricken state
16 prior to and after the death of Jim Gagan. Specifically, Defendants continued to
17 strengthen their 'friendship' with Sarah and Claire, while isolating Plaintiffs (Sarah
18 and Claire), in an already weakened and vulnerable state, from their other friends
19 and acquaintances in furtherance of their plan to obtain, through deceit and undue
20 influence, Plaintiffs' money and other assets. As a result, Defendants further gained
21 the confidence and trust of Plaintiffs (Sarah and Claire), including access to Plaintiff
22 Sarah's finances. Because of Defendants' concerted efforts, Plaintiffs considered
23 Defendants their trusted advisors and confidantes." (Complaint ¶ 23.)

24 "Upon information and belief, over the course of their relationship with
25 Plaintiffs Sarah and Claire, Defendants worked together to take tens of thousands of
26 dollars from the safes of Sarah and Claire, respectively, without their knowledge or
27

1 consent, by virtue of Defendants' position as trusted advisors and family friends."
2 (Complaint ¶ 40.)

3 **6. Marc and Meggie's Fraudulent Conduct Related to**
4 **Conspiracy**

5 Plaintiff allege "Defendants, **and each of them**, knowingly and willfully
6 conspired together and agreed among themselves, or in the alternative, later joined
7 the ongoing conspiracy, and fully ratified all past actions and the purpose of the
8 conspiracy, and agreed to undertake the wrongful acts as alleged herein, resulting in
9 injury to Plaintiffs." (Complaint ¶ 41. Emphasis added.) "Defendants, with the intent
10 to permanently deprive Plaintiffs of their respective personal and real property,
11 fraudulently appropriated the assets of Plaintiffs, all as alleged herein. Defendants
12 knowingly and designedly, by false or fraudulent representations or pretenses,
13 defrauded Plaintiffs of personal and real property." (Complaint ¶ 43.)

14 **7. Marc and Meggie Have Notice of Their Alleged Misconduct**

15 Plaintiffs incorporate the above factual allegations into each of the fifteen
16 claims and supplement them with additional allegations specific to each claim,
17 including allegations comprising the necessary elements and allegations related to
18 "malice, intent, knowledge, and other conditions of [Defendants'] mind," all of
19 which may be alleged generally. *See* Fed. R. Civ. P. 9(b).

20 In the face the above factual allegations describing the circumstances of
21 Defendants misconduct, Defendants make the unsupportable claim that "no facts
22 were set forth as to the conspiracy to commit fraud, fraud, negligent
23 misrepresentation nor any other tortious act in any clear or concise terms as to any
24 Defendant." (Motion, p. 6:14-16.) Defendants claim, "there are no facts pled as to
25 each Defendant's involvement in the alleged series of fraudulent practices. The
26 Complaint is utterly silent on that front." (Motion, p. 7:17-19.)

1 The allegations clearly specify “the who, what, when, where, and how” of the
 2 misconduct. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).
 3 As such, Defendants’ argument “that the complaint must be amended so that all
 4 defendants have sufficient notice of the wrongdoing they are accused of” is without
 5 merit. (*See* Motion, p. 7:2-4.) Although “Defendants” have been referred to in some
 6 instances in the Complaint, dismissal is not warranted under Rule 9(b) because the
 7 allegations are more than sufficient to permit Defendants Marc and Meggie to defend
 8 against the charges. *See Ryan-Beedy v. Bank of New York Mellon*, 293 F. Supp. 3d
 9 1101, 1109 (E.D. Cal. 2018) [“When the allegations otherwise permit the defendant
 10 to defend against the charges, this court is not required to dismiss the complaint for
 11 plaintiffs’ failure to identify a specific representative as the source of a false
 12 representation”].

13 Moreover, the specificity requirements for pleading fraud may be relaxed as
 14 to matters within the opposing party’s knowledge. *Ryan-Beedy v. Bank of New York*
 15 *Mellon*, 293 F. Supp. 3d 1101, 1109 (E.D. Cal. 2018). Here, Plaintiffs’ allegations
 16 of fraudulent conduct are based on both affirmative representations, as well as
 17 omissions or concealments by Marc and Meggie, which would necessarily be within
 18 their knowledge.

19 Finally, it is noteworthy that many of the allegations of fraudulent conduct in
 20 the Complaint describe *omissions*, not affirmative actions. Logically, a plaintiff
 21 cannot possibly plead the specific time or place of an event or representation that
 22 never happened, and the case law in this Circuit acknowledges that reality. *See*
 23 *Washington v. Baenziger*, 673 F. Supp. 1478, 1482 (N.D. Cal. 1987) [“Where the
 24 fraud consists of omissions on the part of the defendants, the plaintiff may find
 25 alternative ways to plead the particular circumstances of the fraud [citation]. For
 26 example, a plaintiff cannot plead either the specific time of the omission or the place,

1 as he is not alleging an act, but a failure to act.”]. Where, as here, Defendants are
 2 alleged to have failed to act, it is not possible to plead the specifics of where, or
 3 when, such a non-action occurred.

4 **B. The Heightened Pleading Standard of Rule 9(b) Applies Only to**
 5 **Plaintiffs’ Fraud-Based Claims**

6 Remarkably, Defendants assert that even Plaintiffs’ ejectment and trespass
 7 claims (among other non-fraud based claims) are subject to Rule 9(b)’s heightened
 8 pleading standard. In so doing, Defendants’ incorrectly rely on *Vess v. Ciba-Geigy*
 9 *Corp. USA*, 317 F.3d 1097 (9th Cir. 2003) to argue that each of Plaintiffs fifteen
 10 claims are subject to Rule 9(b)’s heightened pleading standard, which is typically
 11 reserved for “fraud and mistake.” (Motion, p. 3:15-26.)

12 In *Vess*, the Court noted that “a plaintiff may choose not to allege a unified
 13 course of fraudulent conduct in support of a claim, but rather to allege some
 14 fraudulent and some non-fraudulent conduct. In such cases, only the allegations of
 15 fraud are subject to Rule 9(b)'s heightened pleading requirements **The rule does**
 16 **not require that allegations supporting a claim be stated with particularity**
 17 **when those allegations describe non-fraudulent conduct.** *Vess v. Ciba-Geigy*
 18 *Corp. USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003) (emphasis added).

19 In this scenario, as here, “only the allegations of fraud are subject to Rule
 20 9(b)'s heightened pleading requirements,” and “[a]llegations of non-fraudulent
 21 conduct need satisfy only the ordinary pleading standards of Rule 8(a).” *Id.* at
 22 1104-05 (emphasis added). In other words, Rule 9(b) does not require that
 23 allegations supporting a claim be stated with particularity when those allegations
 24 describe non-fraudulent conduct. *Id.* at 1104.

25 Plaintiffs have asserted the following claims that do not require a showing of
 26 fraud: ejectment, trespass, and three breach of contract claims. Plaintiffs pled
 27

1 allegations of non-fraudulent conduct as the basis for each of these claims. (*See*
 2 Complaint ¶¶ 50-53, 55-60, 96-99, 101-104, 106-110.)

3 Take, for example, the ejectment and trespass causes of action, both of which
 4 are grounded in the simple allegations that (1) the Defendants are in possession of
 5 the Bel Air Home, (2) Defendants do not have title, (3) Defendants have not paid
 6 rent and (4) Plaintiff Halo's has demanded possession of the premises and
 7 Defendants have refused to relinquish possession. These allegations are not fraud
 8 based at all. Therefore, these claims against Marc and Meggie are not "grounded in
 9 fraud." *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)
 10 ["Many of plaintiffs allegations describe non-fraudulent conduct, as opposed to
 11 relying entirely on a unified fraudulent course of conduct, and therefore are not
 12 "grounded in fraud"].

13 Take, as another example, the breach of contract causes of action (causes of
 14 action 7-9). All three breach of contract causes of action are grounded in Defendants'
 15 failure to perform their obligations and duties pursuant to the various contracts, i.e.,
 16 failure to make payments on the cars, failure to pay rent, and failure to renovate the
 17 Montecito Home. These allegations are not grounded in fraud, but in breaches of
 18 contractual terms. These claims sound in contract, not fraud.

19 Contrary to Defendants argument, Rule 9(b)'s particularity requirement is not
 20 a basis for dismissal of Plaintiffs' claims that stand independently on allegations of
 21 non-fraudulent conduct, even if allegations of fraud are incorporated. "Where
 22 averments of fraud are made in a claim in which fraud is not an element, an
 23 inadequate averment of fraud does not mean that no claim has been stated. The
 24 proper route is to disregard averments of fraud not meeting Rule 9(b)'s standard and
 25 then ask whether a claim has been stated." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
 26 1097, 1105 (9th Cir. 2003) [quoting *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*,
 27

1 238 F.3d 363, 368 (5th Cir.2001)]. “Thus, if particular averments of fraud are
 2 insufficiently pled under Rule 9(b), a district court should ‘disregard’ those
 3 averments, or ‘strip’ them from the claim. The court should then examine the
 4 allegations that remain to determine whether they state a claim.” *Vess v. Ciba-Geigy*
 5 *Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003).⁵

6 Even if this Court determines the allegations contained in the non-fraud claims
 7 are subject to Rule 9(b), Plaintiffs have nonetheless satisfied the particularity
 8 requirement, as demonstrated above.

9 **C. Alternatively, Plaintiffs Should be Given Leave to Amend**

10 If the Court finds the Complaint to be deficient, “[l]eave to amend should be
 11 granted if it appears at all possible that the plaintiff can correct the defect.” *Vess v.*
 12 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1108 (9th Cir. 2003) [quoting *Balistreri v.*
 13 *Pacifica Police Dep’t*, 901 F.2d 696, 701 (9th Cir.1988)]; *see also Bly-Magee v.*
 14 *California*, 236 F.3d 1014, 1019 (9th Cir. 2001) [“leave to amend should be granted
 15 unless the district court determines that the pleading could not possibly be cured by
 16 the allegation of other facts”]. “This approach is required by Federal Rule of Civil
 17 Procedure 15(a), which provides that leave to amend should be freely granted when
 18 justice so requires.” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)
 19 [citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)].

20 ///

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23
 24 ⁵ Here, Defendants moved to dismiss the Complaint for failure to plead with
 25 particularity under Rule 9(b), but have made no motion to dismiss under Rule
 26 12(b)(6). Thus, for the claims where fraud is not an element, the Court need only find
 27 that some non-fraud allegations remain after “disregarding” or “stripping” any
 inadequate averments of fraud, if any, but need not test the sufficiency of the
 remaining non-fraud allegations to determine whether they state a claim. *See Vess v.*
Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105-1106 (9th Cir. 2003).

1 **IV. CONCLUSION**

2 For the reasons stated herein, this Court should deny Defendants Motion to
3 Dismiss, or in the alternative, grant Plaintiffs the opportunity to amend the
4 Complaint.

5
6 DATED: June 17, 2022

BUCHALTER
A Professional Corporation

7
8
9 By:



VINCENT R. WHITTAKER
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HEART, LLC, a California Limited
Liability Company, SARAH GAGAN, an
individual, and CLAIRE GAGAN, an
individual